STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2013
v	No. 310092 Wayne Circuit Court
DARIUS GRAHAM, Defendant-Appellant.	LC No. 11-010619-FH

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to two years' probation for the felon-in-possession and CCW convictions, along with a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of unlawfully possessing a firearm outside a nightclub in Detroit. Detroit Police Officer Calvin Lewis testified that he and his partner Eric Smith drove by the nightclub in a marked patrol car. According to Officer Lewis, defendant looked back at the patrol car, reached into his waistband with his right hand, pulled out what appeared to be a silver handgun, threw it away, and continued walking. The object struck a storage container, making a loud noise. The officers stopped and Smith, who had heard the noise but had not seen what caused it, looked around the storage container and found a silver handgun. The jury found defendant guilty as charged.

When defendant appeared for sentencing on March 15, 2012, the trial court disclosed that it had received written correspondence which referred to an enclosed flash drive that allegedly contained a recorded conversation in which Officer Lewis stated that he did not see defendant throw a gun. Neither the trial court nor counsel listened to the recording and its actual contents were not placed on the record. During his allocution at the sentencing hearing, defendant claimed that the flash drive revealed Lewis's acknowledgment that he did not see defendant throw the gun. The record does not disclose what happened to the flash drive after the sentencing proceeding. Apparently neither defendant's present appellate counsel nor the prosecutor have been able to locate it.

Defendant's sole argument on appeal is that trial counsel was ineffective for failing to promptly move for a new trial on the basis of this alleged newly discovered evidence. Because defendant failed to raise this ineffective assistance of counsel claim in the trial court, our review of this issue is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, defendant must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citation omitted). We are to presume that counsel provided effective assistance, and a defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Here, assuming that trial counsel's performance fell below an objective standard of reasonableness, we simply cannot conclude that defendant satisfied his burden to establish prejudice, i.e., that there is a reasonable probability that he would have been acquitted but for any presumed deficient performance on counsel's part. We cannot reach this conclusion because no flash drive has been provided to us, nor do we have a transcript of any recorded statements contained on the flash drive. We merely have knowledge from the record that a flash drive existed. Neither defendant's current appellate counsel, nor his previous two appellate attorneys, filed a motion for remand to explore the location and contents of the flash drive. Indeed, appellate counsel has not set forth the nature of any efforts to obtain the flash drive. Defendant relies instead on his own self-serving statements at the sentencing hearing in regard to the flash drive's contents. We are not prepared to accept defendant's mere assertions on the matter. Moreover, Officer Smith testified that, while he did not see defendant actually toss the gun, he did hear the sound of something hitting the storage container and then looked over to see defendant "come from the rear of the area where [he] heard the thud[.]" On the basis of the existing record, the requisite prejudice has not been shown and reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan